ORAL ARGUMENT SCHEDULED FOR JANUARY 25, 2019
Nos. 18-1124, 18-1168

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

International Longshore & Warehouse Union
Petitioner/Cross-Respondent

v.

National Labor Relations Board
Respondent/Cross-Petitioner

and

International Association of Machinists and Aerospace Workers, AFL-CIO;
District Lodge 190; Local Lodge No. 1546
Intervenors

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

PETITIONER'S FINAL REPLY BRIEF

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INTRODUCTION

The Board's and Intervenor IAM's Briefs argue that this case is an easy one and that all this Court must do is look at its decision in *International Longshore & Warehouse Union v. NLRB (PCMC III)*, 890 F.2d 1100 (D.C. Cir. 2018). In that case, this Court affirmed the Board's decision, which found that PCMC was a single employer with PMMC, PCMC violated the Act by not recognizing IAM on March 31, 2015, and ILWU violated the Act by accepting recognition as the collective bargaining representative of the mechanics working for PCMC in the Ports of Oakland and Tacoma. The Board and IAM would have this Court wholly ignore everything that occurred between March 31, 2005, and July 1, 2013, and simply find that PAOH was a *Burns* successor to PCMC. However, the facts and circumstances as they developed over the course of over eight intervening years, and what the facts and circumstances actually were in July 2013, are essential to determining whether PAOH was a *Burns* successor and whether PAOH and ILWU violated the Act. ILWU was prepared to present evidence and testimony regarding the alleged bargaining unit to show that it was no longer appropriate in July 2013. But, all of ILWU's evidence and defenses were rejected and barred from the record. ILWU has suffered a serious violation of its due process rights that must be cured.

The Board also erred in approving the settlement among PAOH, MTC, and IAM. The evidence is undisputed that the settlement was not reasonable under the governing legal standard because it distributed money based on arbitrary and

discriminatory criteria. IAM's claim that ILWU does not have standing to challenge the settlement is nothing more than IAM's continued attempt reward only its loyal members, while the rest of the alleged unit sees no piece of the settlement.

Finally, the Board's ordered remedies in this case exceed its authority. There is no basis for an affirmative bargaining order where the employer and the alleged unit are gone. That is precisely the case here. Likewise, the Board's order that ILWU reimburse all alleged unit employees exceeds the Board's remedial authority as it is punitive and provides a windfall.

ARGUMENT

I. The Board's Refusal To Admit And Consider ILWU's Evidence And Defenses Is Reversible Error Because ILWU Has Been Denied Due Process And The Proffered Evidence Shows That The Alleged Unit Was Not Appropriate.

ILWU was effectively barred from putting on any of its defenses and evidence at trial. The Board's rationale for upholding the ALJ's pervasive denial of due process is based on a vexing position that absolutely nothing that happened for the more than eight years between March 31, 2005 and July 1, 2013 matters because PCMC, an employer who is *not* party to this litigation, unlawfully refused to bargain with IAM on March 31, 2005. The Board's position disregards due process as well as what occurred over more than eight years leading up the alleged ULPs at issue here and how it affected the very unit employees in whose interest the Board claims to act.

A. ILWU Was Denied Its Due Process Right To Fully and Fairly Litigate Its Defenses.

As addressed in ILWU's Opening Brief, the Board legally erred in refusing to overrule the ALJ's rulings barring ILWU from presenting its evidence and defenses at trial. (*See* ILWU Br. at 21-25).[1] The Board's and IAM's Briefs fail to directly address this blatant due process violation that was perpetrated against ILWU – denying ILWU its right to have a full and fair opportunity to litigate the charges against it.[2] Nor do they dispute that this fundamental due process right is guaranteed by the Fifth Amendment and applies in the context of National Labor Relations Board administrative actions. To the contrary, the Board has acknowledged fundamental due process rights and their importance. *E.g., Lamar Cent. Outdoor*, 343 NLRB 261, 265 (2004); *King Manor Care Center*, 308 NLRB 884, 889 (1992). So too has this Court. *Bellagio, LLC v. NLRB*, 854 F.3d 703, 712 (D.C. Cir. 2017) (quoting *Lamar*, 343 NLRB at 265 (2004)). The Board's complete bar on ILWU's evidence and defenses is a due process violation of such pervasive nature, that it cannot go unremedied. *Cf. Ozark Auto. Distribs., Inc. v. NLRB*, 779 F.3d 576, 583-84 (D.C. Cir. 2015) (vacating Board's decision to exclude evidence crucial to

[1] Abbreviation "Br." is used throughout to refer to briefs filed with this Court in this matter, including ILWU's Opening Brief, the Board's Brief, and IAM's Brief.
[2] In its Brief, the Board appears to argue that ILWU's due process was not violated because the ALJ "considered ILWU's rejected evidence in her decision." (Br. at 35, n.15). This does nothing to cure the due process violation here – ILWU's rejected evidence is not part of the record upon which the Board based its D&O.

employer's defense).[3] At minimum, this Court should vacate the D&O and remand to the Board so ILWU can present its evidence and defenses.

B. The Denial of ILWU's Due Process Rights Is Not Justified by PCMC's 2005 ULPs.

Rather than address this serious due process violation for what it is, the Board and IAM argue that ILWU's proffered evidence and defenses were properly barred because they all were "irrelevant" because they "were the direct result of unremedied unfair labor practices." (Board Br. at 32; IAM Br. at 3). As discussed in ILWU's Opening Brief, this argument is wrong. (Br. at 24-25). All of the facts and circumstances for over eight years, March 31, 2005 (when PCMC committed ULPs) through July 1, 2013 (when PAOH hired PAOH mechanics), cannot be "irrelevant."[4] Here, ILWU's rejected evidence and the defenses it was barred from presenting at trial were directly relevant to what the Board terms the "key issue" to this case –

[3] In *Ozark Auto. Distribs.*, this Court quoted a passage from Chief Justice Traynor's monograph that is apt here: "There are sometimes errors at a trial that deprive a litigant of the opportunity to present his version of the case. These are also ordinarily reversible, since there is no way of evaluating whether or not they affected the judgment. When, for example, an appellant has been deprived of the opportunity to summon witnesses, the appellate court can hardly determine what testimony would have materialized but for the error. No subjunctives can fill the void in a very present record." 779 F.3d at 586 (citation omitted).

[4] The Board's Brief incorrectly claims that ILWU is "seemingly trying to relitigate *PCMC I*." (Br. at 35-36). The *PCMC* case addressed whether the Act was violated when PCMC did not bargain with IAM and instead recognized ILWU as the bargaining representative of the alleged unit employees on March 31, 2005. The facts and circumstances following March 31, 2005, were not at issue.

whether PAOH was PCMC's successor. (Board Br. at 4). Whether the alleged unit was appropriate on July 1, 2013, is determinative of whether PAOH was PCMC's successor.[5] ILWU's rejected evidence showed that the alleged unit was not appropriate and PAOH was not PCMC's successor because the unit had accreted to the ILWU coastwise bargaining unit, ILWU had uncoerced majority support among the alleged unit, and PAOH had, at minimum, a good faith doubt as to IAM's majority support.

The Board and IAM cite to this Court's recent decision in *PCMC III* as if it is dispositive of the issues here. 890 F.3d at 1112. It is not. In that case, this Court affirmed the Board's decision finding that a *different* employer, PCMC, committed ULPs in March 2005. This Court held that it would not consider evidence after March 31, 2005, to determine whether accretion of the alleged unit had occurred because "[t]o hold otherwise would allow [the employer] to benefit from *its own* unlawful conduct." *Id.* at 1111 (quotations and citation omitted) (emphasis added). Likewise, in *Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 39 (D.C. Cir. 2015), cited by the Board and IAM, this Court held that when considering community of interest factors, the Board does not consider impermissible unilateral changes made

[5] To be a *Burns* successor, the bargaining unit must remain appropriate. *NLRB v. Burns Security Servs.*, 406 US 272, 281 (1972); *accord Border Steel Rolling Mills, Inc.*, 204 NLRB 814, 821-22 (1973) (where bargaining unit has accreted to another unit, it is no longer appropriate under *Burns*).

by the employer. This Court did not state that all subsequent facts, circumstances, and changes in perpetuity are barred from consideration.

In this case, PCMC was not the employer. PAOH, an entirely separate company from PCMC, was the employer. However, the Board has used ULPs committed by PCMC in 2005 as justification for barring evidence of everything that occurred through July 2013 and evidence of what the alleged unit looked like on July 1, 2013, when PAOH hired mechanics. That is not what the relevant case law provides. The case law provides that an employer cannot rely on evidence and facts and circumstances that are the direct result of *its own* ULPs.[6] Thus, PCMC's 2005 ULPs do not require the Board or this Court to turn a blind eye to over eight years and the reality of the alleged unit as of July 2013.

II. The Board's Finding That ILWU Violated The Act By Accepting Recognition And Representing The PAOH Mechanics Is Not Supported By Substantial Evidence And Should Be Reversed.

Contrary to the Board's overly simplistic argument, the D&O finding that ILWU violated the Act by accepting recognition as the collective bargaining representative of the PAOH mechanics and applying the PCL&CA to them is not "supported by the substantial evidence on the record as a whole."

First and foremost, and as discussed above, the "record" is anything but "whole" here. A significant amount of evidence, all of it proffered by ILWU, was

[6] *See* ILWU Opening Br. at Section III.A., pg. 36 and n.4.

rejected and did not become part of the record. Therefore, the evidence was not part of the record upon which the Board based its May 2, 2018 D&O. It was unreasonable to outright reject all of ILWU's evidence, save for a mere three of 227 exhibits and incomplete testimony from only two witnesses. ILWU's Offer of Proof identifies the vast relevant and crucial evidence that was barred from the record. (*See* JA 1643-1711). No "reasonable mind" could accept a record devoid of all of the evidence ILWU attempted to present in support of its defenses "as adequate to support [the Board's] conclusion" that ILWU violated the Act. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). Thus, in light of egregious due process violations and an undisputedly incomplete record, this Court should reverse the Board's finding.

Second, ILWU's proffered evidence shows that ILWU did not violate the Act by accepting recognition as the collective bargaining representative of the PAOH mechanics and applying the PCL&CA. The proffered evidence shows that PAOH was not a *Burns* successor to PCMC because the alleged unit was not an appropriate unit in July 2013, when PAOH hired mechanics. The alleged unit had accreted to the ILWU coastwise bargaining unit (ILWU Br. at 26-30), ILWU had uncoerced majority support among the alleged unit[7] (ILWU Br. at 30-34), and PAOH certainly

[7] Contrary to the Board's Brief (Br. at 37), it is not "the mere fact that a majority of unit employees were ILWU members when PAOH came along" that shows ILWU's uncoerced majority support. As explained in ILWU's Opening Brief,

had at least a good faith doubt that IAM had majority support[8] (ILWU Br. at 34-35). ILWU's Offer of Proof lays out 227 exhibits ILWU attempted to introduce and identifies several witnesses ILWU intended to call to testify, explaining the significance and relevance of each. (JA 1643-1711). Had this evidence and testimony been admitted, the record would have shown that the alleged unit was not appropriate in July 2013, and, therefore, no violations of the Act occurred.

Ironically, in discussing whether the alleged unit was appropriate in July 2013, the Board's Brief states:

> Given the *fact-intensive nature of this inquiry*, the Board has "broad discretion" in making bargaining-unit determinations and its findings are "entitled to wide deference. Accordingly, the party challenging a historical unit bears "a heavy *evidentiary burden*" to show that it is no longer appropriate. ILWU has not met that burden here.

(Board Br. at 28-29). This is in complete contradiction with the Board's argument that no evidentiary analysis is necessary here because PCMC's 2005 ULPs make all

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majority of the 53 mechanics hired by PAOH had affirmatively chosen ILWU as their representative. Sixteen (or 30.19%) chose to be represented by ILWU *before* March 31, 2005, the date of the PCMC ULPs, and 13 (or 24.52%) chose to apply for a steady mechanic position at Outer Harbor through the joint ILWU-PMA steady hiring process. Thus, 54.71% of the PAOH mechanics affirmatively chose ILWU as their representative. In addition, 10 of the 53 mechanics had worked for TBCT prior to the workforce at Berths 25-26 being merged with the workforce at Berths 20-24. The GC did not allege a ULP and, in fact, conceded no ULP occurred. Thus, there is no basis to assume that those additional 10 mechanics supported IAM in 2013. (ILWU Br. at 30-34).

[8] Once again, the Board chooses to ignore the facts that do not support its case. Those facts, laid out at pgs. 34-35 in ILWU's Opening Brief, show that PAOH had a good faith doubt that IAM had majority support among the alleged unit.

facts, circumstances, and evidence irrelevant. That also is the exact reasoning the ALJ used to deny ILWU due process and reject all of its proffered evidence. The Board goes on to argue that ILWU has not met its evidentiary burden. However, ILWU did meet its burden with all of its evidence – the evidence that was rejected because, according to the Board, no fact inquiry is necessary here. ILWU's evidence should be admitted and considered because determining whether a unit remains appropriate is a "fact-intensive" inquiry that requires a careful analysis of all the evidence. ILWU's proffered evidence shows the alleged unit was no longer appropriate in July 2013.

III. The Board's Denial Of ILWU's Appeal Of The Approval Of The Settlement Should Be Reversed.

A. Like Any Other Board Order, a Board Order Approving a Settlement Must Be Supported by Substantial Evidence.

The Board and IAM argue that the Court should review the Board's order approving the settlement under an abuse of discretion standard as opposed to the typical substantial evidence standard. They cite no authority for this proposition. To the contrary, the General Counsel and IAM both rely on *Beverly California Corp. v. NLRB*, 253 F.3d 291, 294 (7th Cir. 2001), where the court applied a substantial evidence standard to review a Board order rejecting a settlement agreement reached before an ALJ. *See also NLRB v. Int'l Bhd. of Elec. Workers, Local Union 112, AFL-CIO*, 992 F.2d 990, 992 (9th Cir. 1993) (applying substantial evidence standard in

reviewing Board order rejecting settlement reached before ALJ). That the Board has "wide latitude" to settle cases at the prosecutorial stage, as the Board argues, says nothing about the standard of review the Court should apply in evaluating whether the Board acted appropriately within the latitude granted the agency by the law.

B. Substantial Evidence Did Not Support the Board's Approval of the Settlement.

In its Brief, the Board claims that the settlement passes the test set forth in *Independent Stave Co.*, 287 NLRB 740 (1987), and points to the ALJ's articulation of the factors and her requests for supplemental briefing. There is no dispute that the ALJ cited the correct test. The problem is that she misapplied the test by finding the settlement reasonable despite the arbitrary distribution scheme. That she permitted supplemental briefing before reaching her decision does not remedy the problem.

In defending IAM's proposed distribution plan sketched out in a letter from counsel, the Board and IAM largely side-step ILWU's critiques. The Board says that the proposed distribution plan is reasonable because under the theory of the Complaint, not all employees would be entitled to an equal remedy. ILWU agrees that different mechanics should recover different amounts. The problem with the proposed distribution plan is that it categorizes people arbitrarily and discriminatorily based on union membership. Contrary to what the Board and IAM argue in their Briefs, ILWU raised this discriminatory aspect of the distribution

scheme in its objections to the settlement before the Board when ILWU argued that the proposed distribution plan reeked of "cronyism" and "favoritism." (JA 306-308, 407).

IAM claims that its proposed plan was "based on an approximation of how each bargaining unit member was harmed." (IAM Br. at 14). But as ILWU outlined in its Opening Brief, IAM's approximation was not based on facts or evidence. (Br. at 44-46). For multiple people, the evidence contradicts IAM counsel's representations about their work histories which IAM offered as the basis for their recovery. (*Id.*).

IAM says that only its members "suffer[ed] harm from the unlawful recognition;" therefore, it was appropriate for it to give settlement money to only its members. (IAM Br. at 15). But IAM's argument is contrary to the theory of the complaint, which must be the starting point for analyzing the reasonableness of any settlement. *See Independent Stave*, 287 NLRB at 743 (Board must examine "whether the settlement is reasonable in light of the nature of the violations alleged"). The Complaint alleged that IAM represented everyone and sought a make-whole remedy for everyone. The Board order against ILWU and PAOH has the same scope. It orders ILWU to withdraw recognition from the entire unit, reimburse dues from the entire unit, and orders PAOH to bargain with IAM on behalf of the entire unit, not merely those whom IAM now says were the only ones harmed.

IAM attempts to distinguish *Dist. 65, Distributive Worker*, 214 NLRB 1059 (1974) on the grounds that in that case, all employees in the unit were harmed. The Complaint here makes the same allegation.

C. ILWU Has Standing To Challenge the Board's Order Approving the Settlement.

The Board's Brief does not challenge ILWU's standing to appeal the Board order approving the settlement, but IAM's does. IAM's arguments are without merit.

IAM agrees that *Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v. NLRB*, 694 F.2d 1289, 1294 (D.C. Cir. 1982) sets forth the relevant standard for standing. Under that case, "standing to appeal an administrative order as a 'person aggrieved,' 29 U.S.C. § 160(f), arises if there is an adverse effect in fact, and does not . . . require an injury cognizable at law or equity." *Id.* at 1294.

IAM contends that ILWU does not meet this standard because ILWU did not lawfully represent the employees during the 2013 to 2016 time period covered by the settlement agreement. But IAM does not deny that ILWU represented the employees *lawfully* at the time the money was paid. By paying money to some in the bargaining unit and denying it to others for arbitrary reasons, the settlement approved by the Board injures ILWU in its role as the representative of all unit members who have been denied a fair, evidence-based distribution.

IAM's attempt to distinguish *Retail Clerks Union 1059 v. NLRB*, 348 F.2d

369 (D.C. Cir. 1965) fails. In *Retail Clerks*, the Court found that a union had standing to challenge a Board order entered pursuant to a settlement agreement. Even though the petitioner union was not a party to the agreement, the order "impaired [the union's] organizational abilities." On this basis, the Court found that the effect of the order on the petitioner union was not "unduly speculative" and thus gave "the union sufficient interest for judicial review." *Id.* at 370. Here too, the settlement agreement impairs ILWU's organizational abilities by putting employer money in the pocket of some members of the unit ILWU represents and not others based on arbitrary criteria. Thus, as in *Retail Clerks*, ILWU's interest is not unduly speculative and is sufficient to permit review.

IV. The Remedies Ordered By The Board Should Be Vacated Because They Go Beyond The Board's Remedial Authority And Are Contrary To The Policies Of The Act.

The Board contends that the remedies ordered by D&O are appropriate under section 10(c) of the Act. The Board's Brief accurately quotes from Section 10(c) but then takes extreme liberality with what it means. Section 10(c) provides that the Board, on finding an unfair labor practice, may order the violator to "cease and desist" and "take such affirmative action . . . as will effectuate the policies of the Act." 29 U.S.C. § 160(c).

Section 10(c) is not as expansive as the Board would have this Court believe. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 142-43 (2002)

("Board's discretion to select and fashion remedies . . . is not unlimited."). It does not confer upon the Board an unchecked ability to mete out remedies that do not serve a *remedial* purpose and effectuate the purposes of the Act. *Douglas Foods Corp. v. NLRB*, 251 F.3d 1056, 1067 (D.C. Cir. 2001). And, "this authority . . . does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the [violator] any penalty it may choose . . . . , even though the Board may be of the opinion that the policies of the Act might be effectuated by such an order." *Consol. Edison Co. of New York v. NLRB*, 305 U.S. 197, 235-36 (1938). Rather, "affirmative action to 'effectuate the policies of the Act' is action to achieve the remedial objectives which the Act sets forth." *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12, (1940). Thus, courts have routinely struck down Board remedies as punitive or beyond the scope of Section 10(c) when they exceed the Act's strictly remedial purpose. *E.g.*, *Carpenters Local 60 v. NLRB*, 365 U.S. 651, 658 (1961); *Republic Steel*, 311 U.S. at 13; *Consol. Edison*, 305 U.S. at 238-39; *Unbelievable, Inc. v. NLRB*, 118 F.3d 795, 805-06 (D.C. Cir. 1997); *see also Oil, Chemical & Atomic Workers Int'l Union v. NLRB*, 445 F.2d 237, 246 (D.C. Cir. 1971). All of these cases stand for the principle that awards under Section 10(c) must remedy the injury to the affected employees and place them in no worse nor better positions than they would have been in had the ULP not occurred. Here, the Board's ordered remedies violate this principle.

A. The Affirmative Bargaining Order Serves No Remedial Purpose.

The Board's Brief shows that the affirmative bargaining order serves no remedial purpose. The Board argues that the bargaining order is necessary *in case* PAOH resumes operations at the Port of Oakland and employs the alleged unit. Thus, a bargaining order is nothing more than a "what if" remedy, which is *exactly* why the General Counsel did *not* seek a bargaining order in the operative Second Amended Complaint.

The Board then goes on to fundamentally misrepresent ILWU's position. (Board Br. at 55). It is not ILWU's position that a bargaining order is unnecessary merely because PAOH has filed bankruptcy. Rather, all parties – the General Counsel, PAOH, IAM, and ILWU – stipulated on the record during trial that PAOH had filed for bankruptcy, that it had ceased all operations, and that it had no intention of resuming operations.[9] The bargaining unit no longer exists.

The Board mischaracterizes the holdings of the cases it cites. The Board cites to a footnote in *NLRB v. Warehouse Supermkts. of Ariz., Inc.*, 956 F.2d 1167, at *1 & n. 1 (9th Cir. 1992) (unpublished table decision), where the court stated that filing for bankruptcy does not stay enforcement of an NLRB order. In that case, the employer was still operational and, therefore, a bargaining order was not speculative. The Board also cites *Ahrens Aircraft, Inc. v. NLRB*, 703 F.2d 23, 23 (1st Cir. 1983)

[9] IAM agrees that "PAOH has been liquidated." (IAM Br. at 2).

(per curiam), where the court held that bankruptcy proceedings do not render an NLRB proceeding moot; and, again, the employer remained operational and a bargaining order was not hypothetical. These cases do nothing to support a bargaining order aimed to provide a remedy under an imaginary set of facts and circumstances – exactly what the D&O provides here.

The D&O utterly fails to justify a bargaining order under the required analysis. An affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balance of three considerations: (1) the employees' §7 rights; (2) whether other purposes of the Act override the rights of the employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." *Vincent Indus. Plastics, Inc. v. NLRB*, 209 F.3d 727, 738 (D.C. Cir. 2000). And this must be considered based on the facts and circumstances at the time the order is issued. *Cogburn Health Center, Inc. v. NLRB*, 437 F.3d 1266, 1273 (D.C. Cir. 2006); *Flamingo Hilton-Laughlin v. NLRB*, 148 F.3d 1166, 1172 (D.C. Cir. 1998); *Charlotte Amphitheater Corp. v. NLRB*, 82 F.3d 1074, 1080 (D.C. Cir. 1996). In the D&O, the Board simply repeats the factors to be considered and concludes the bargaining order is justified, without any "reasoned analysis" and without an "explicit balance" of the three factors. What the Board's Brief does, in an attempt to make the D&O's bare conclusion look reasoned, is rely on rank speculation, such as speculating as to future challenges that may be faced by

IAM or unit employees (who no longer exist) *if*, contrary to undisputed stipulations on the record, PAOH resumes operations and employs the alleged unit.

This Court should vacate the Board's bargaining order because the Board did not justify it as required, the bargaining order is pointless in light of the facts, and other traditional remedies are sufficient.

B. Reimbursement of Initiation Fees, Dues, and Other Monies by ILWU Does Not Serve To Remedy Alleged Losses and Is Punitive.

To require ILWU to reimburse initiation fees and dues paid to mechanics it has represented for over a decade does not carry out the purposes of the Act, exceeds the Board's statutory authority because it is punitive to ILWU, and is a windfall, rather than a make whole remedy, to unit employees. The Board and IAM do not deny that the unit employees received union representation and ultimately superior wages and benefits than they would have received if represented by IAM and that they would have paid IAM dues. Nor do they dispute that the unit employees continued to have jobs after PAOH's closure thanks to their representation from ILWU. They also do not deny that millions of dollars were paid by PAOH and MTC to settle the Board's and IAM's claims against PAOH and MTC based on monetary losses allegedly suffered by the unit employees, including payment of dues to ILWU, and that PAOH is jointly and severally liable for initiation fees and dues. Thus, any further monetary relief paid by ILWU to unit employees, even if "customary," would exceed a "make whole" remedy and be punitive. *E.g., Oil, Chemical & Atomic*

Workers Int'l Union, 445 F.2d at 246.

The Board's argument also principally relies on an inapplicable case, *Local 1814, International Longshoremen's Association v. NLRB*, 735 F.2d 1384 (D.C. Cir. 1984). *Local 1814* was "a truly stark case of corruption" involving a "deliberate, flagrant, and very substantial kickback scheme." *Id.* at 1387. The Circuit distinguished the facts before it from those in *Local 60 Carpenters v. NLRB*, 365 U.S. 651 (1961), where dues repayments were found to be punitive and exceed the Board's authority under Section 10(c) because there was no evidence of union coercion. *Id.* at 1404-05. In the instant case, there is no evidence of criminal activity or corruption, as there had been in *Local 1814*.

The Board further argues that a compliance proceeding before the Board is the appropriate place to address whether dues repayment is punitive and would provide a windfall. There is nothing to be gained by kicking the can down the road. The Board has ordered remedies and this Court has authority now to ensure that they are not punitive and do not go beyond the scope of Section 10(c). The repayment of dues in this case is both. *E.g.*, *Carpenters Local 60*, 365 U.S. at 658-59 (Board lacked authority to order union to reimburse members for all dues and fees collected under unlawful closed shop agreement); *Republic Steel*, 311 U.S. at 13 (Board could order back-pay for unlawfully fired workers minus their interim earnings on government work relief projects, but lacked authority to order employer to pay back

government); *Consol. Edison*, 305 U.S. at 238-39 (Board lacked authority to strike contracts); *Unbelievable, Inc.*, 118 F.3d at 805 (Board lacked authority to order payment of attorneys' fees and costs); *see also Oil, Chemical & Atomic Workers Int'l Union*, 445 F.2d at 246 (Board correctly ordered net backpay because gross backpay would be "essentially punitive"). Here, this Court should vacate the order that ILWU pay dues and fees to unit employees because it is punitive and will result in a windfall to the workers. For the same reasons, even if the Court determines that reimbursement of dues and fees is appropriate, the remedy should be modified to match the remedy in the *PCMC* case, which excludes any unit employees who joined ILWU prior to March 31, 2005. *PCMC/Pacific Crane Maintenance Company, Inc. (PCMC II)*, 362 NLRB No. 120, *2 (2015) (Respondents "will be ordered jointly and severally to reimburse all present and former unit employees *who joined the Respondent Union on or since March 31, 2005*, for any initiation fees, periodic dues…") (emphasis added); *see, e.g., Human Dev. Ass's*, 293 NLRB 1228, 1229 (1989); *Control Servs. Inc.*, 319 NLRB 1195, 1196 (1995). The remedy also should be qualified to limit any reimbursement only to the time the alleged unit employees worked as a steady mechanic for PAOH.

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CONCLUSION

For the foregoing reasons, Petitioner ILWU respectfully requests that this Court grant its Petition, deny the Board's cross-application for enforcement, and vacate the Board's Decision and Order. Alternatively, this Court should remand the matter so ILWU may be afforded its due process right to present its case and evidence.

Dated: November 30, 2018

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CERTIFICATE OF COMPLIANCE

1. This document complies with the Federal Rule of Appellate Procedure 28.1(e)(2)(A)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e), this document contains 5,052 words.

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Dated: November 30, 2018 LEONARD CARDER, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2018, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 30, 2018 LEONARD CARDER, LLP

By: /s/ Lindsay R. Nicholas
Lindsay R. Nicholas